APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 371—October Term, 1962

(Argued June 6, 1963 Decided June 28, 1963)

Docket No. 27815

UNITED STATES OF AMERICA, *Appellee*,

v.

DOMINICK S. FAGO, *Appellant*.

Before: CLARK and FRIENDLY, *Circuit Judges* and ZAVATT, *District Judge*.*

Appeal from a judgment of the District Court for the Western District of New York, John O. Henderson, Judge, convicting defendant, after a verdict, for filing false income tax returns and failing, as principal officer of a corporation, to file withholding tax returns. Affirmed.

HERALD P. FAHRINGER, JR. (Lipsitz, Green and Fahringer, Buffalo, New York), *for Appellant*.

EDMUND F. MAXWELL (John T. Curtin, United States Attorney, Buffalo, New York), *for Appellee*.

PER CURIAM:

Dominick Fago appeals from a judgment of the District Court for the Western District of New York convicting him, after a verdict, of violating 26 U.S.C. § 7201 by filing false and fraudulent income tax returns for 1954 and 1955 and of violating 26 U.S.C. § 7203 in failing, as principal officer of John B. Schultz Contracting Co., Inc. and of Nottingham Contracting Corporation, to file six specified withholding tax returns due in 1955 and 1956. Although Fago's brief

* Of the Eastern District of New York, sitting by designation.

urged that the evidence was insufficient to warrant a conviction, this point was not pursued in argument and is wholly without merit. The claim seriously pressed on us was that the convictions were obtained in violation of Fago's rights to be secure against unreasonable searches and seizures and not to be compelled to be a witness against himself, guaranteed by the Fourth and Fifth Amendments.

The claim is that Fago turned his personal and corporate records over to the District Attorney of Erie County, New York, for examination in the latter's investigation of corruption in the City of Lackawanna, under a state grant of immunity; that the state officials permitted the Internal Revenue Service to examine these records; and that thereafter the state officials turned the records over, pursuant to an administrative summons, to the federal authorities investigating Fago's tax liabilities. We are invited to consider large and interesting constitutional questions in regard to cooperation between state and federal officials enabling the latter to obtain indirectly evidentiary material which the Fifth Amendment would prevent them from obtaining directly. We must decline the invitation. For, apart from the fact that the records came into the possession of the New York authorities for a purpose wholly unrelated to the subsequently initiated federal inquiry, Fago failed to show that the documents were his personal papers rather than records of the corporations, which he could himself have been compelled to produce. The only item seriously questioned on this score was a group of sheets setting forth data as to employees of the Schultz and Nottingham companies for a particular week in 1955. But a compilation from the records of two corporations would seem, *prima facie*, to be a record of the two corporations, and Fago offered nothing to overcome this natural inference. His contention that an officer of a corporation cannot be required to produce corporate records which are sought to prove a crime against him runs counter to the teaching—never since questioned by the Supreme Court—

of *Wilson* v. *United States*, 221 U. S. 361, 385 (1911). His claim that the *Wilson* rule is inapplicable when a corporation is a mere *alter ego* of its owner is answered by the portion of *United States* v. *Guterma*, 272 F. 2d 344, 346 (2 Cir. 1959), relating to Chatham Corporation, and the authorities there cited.

Affirmed.

APPENDIX B

Section 952-t, New York Code of Criminal Procedure

§ 952-t. Stenographers' duties

It shall be lawful for any stenographer duly appointed and qualified as hereinbefore provided, to attend and be present at the session of every grand jury impaneled in the county in which he is appointed, and it shall be his duty to take in shorthand or upon a typwriting machine the testimony introduced before such grand juries, and, except when his original notes and minutes and the exhibits pertaining thereto have been impounded as hereinafter provided for, to furnish to the district attorney of such county a full copy of all such testimony as such district attorney shall require, but he shall not permit any other person to take a copy of the same, nor of any portion thereof, nor to read the same, or any portion thereof, except upon the written order of the court duly made after hearing the said district attorney provided, however, that the judge presiding over the term of court for which any grand jury is drawn, may at any time during the sitting of such grand jury and upon petition signed by its foreman or acting foreman and certified by its clerk to have been authorized by twelve or more of the grand jurors constituting such grand jury, impound the stenographer's original notes and minutes and the exhibits pertaining thereto or any portion of such original notes, minutes, and exhibits, and may order them to be delivered to him and placed in his custody or in the custody of a public officer

named by him. When so impounded, such original notes, minutes, and exhibits shall not be taken from the custody of such judge or such public officer except upon the order of such judge, who, upon the written requisition of the foreman or acting foreman of such grand jury, shall deliver them or order them to be delivered to such foreman or action[1] foreman for use in the grand jury room during the hours when the grand jury is actually in session. Except as above provided, all of the said original notes and minutes shall be kept in custody of said district attorney, and neither the same, nor a copy of the same, or any portion of the same, shall be taken from the office of said district attorney, excepting as above provided. Nothing contained in this section, however, shall be construed to prohibit a grand jury from inspecting its own minutes and exhibits while in session. Added L.1909, c. 66, § 4; amended L.1941, c. 914, § 1, eff. Sept. 1, 1941.

[1] So in original. Probably should read "acting".